UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	
Union Tank Car Company,	Case No.: 12-RC-221165
Respondent Employer,	
and	Case Nos.: 12-CA-210779 12-CA-219374 12-CA-220822 12-CA-222661
INTERNATIONAL ASSOCIATION OF, SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS (SMART)	
Charging Party Union,	

UNION TANK CAR COMPANY'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

The Board should deny all of General Counsel's exceptions to the Decision (JD-03-19) dated January 11, 2019, by the Administrative Law Judge, Arthur J. Amchan (the "ALJ" or "ALJ Amchan").

In that decision, ALJ Amchan correctly decided that Union Tank Car Company ("UTLX" or the "Company") did not violate Section 8(a)(1) of the Act by maintaining a work rule (also known as "Rule 32") that prohibited employees from making "[s]tatements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees." [ALJD 7:5-26].[1] Under the *Boeing* standard, Rule 32 would not be reasonably read as encompassing Section 7 activity. [ALJD 7:5-25]. Moreover, even if Rule 32 posed a potential adverse impact on Section 7 rights, which it does not, UTLX's stated justification for Rule 32 – protecting the Company's relationship with its employees and customers – outweighs that potential impact.

ALJ Amchan also correctly decided that UTLX Supervisor Graham Bridges' alleged statements to then-employee Ridge Wallace did not violate Section 8(a)(1) of the Act. [ALJD 10:15-23].[2] If Bridges actually the alleged statement ALJ Amchan attributes to him, then ALJ Amchan correctly determined that Bridges was merely informing Wallace how the Company dealt with him in the past due to unionization. [*Id.*]. An employer does not violate the Act by informing employees that unionization previously brought about a change in the manner in which the

[1] ALJ Amchan's decision is cited herein as "ALJD ___." References to the hearing held on November 14, 2018 will be "Tr. __." "JX-__" references are to the joint exhibit. "GC Exh. __" references are to the General Counsel's exhibits. "Bd. Exh. __" references are to the Board Exhibits. "Company Exh.__" references the other exhibit introduced by UTLX during the hearing.

[2] In its cross-exceptions filed simultaneously herewith, UTLX is contesting ALJ Amchan's factual finding that Bridges told Wallace that if it were not for the Union, Wallace would have received a written warning instead of a 30-day suspension. [ALJD 5:26-28].

employer and employee dealt with each other. *See International Baking Co. & Earthgrains*, 348 NLRB 1133, 1135 (2006).

Lastly, in his Decision, ALJ Amchan also appropriately denied an objection to the representation election filed by the International Association of Sheet Metal, Air and Rail Transportation Workers ("SMART" or the "Union") on the basis of Jody James' removal of Union literature from the break room on June 21, 2018. [ALJD 8:35-9:20].[3] At the hearing, General Counsel unequivocally denied seeking to have the election results be set aside, stating that it was leaving that task to the Union [Tr. 12:12-16]; however, General Counsel now – for the first time – advocates that the election be set aside. This issue is not properly before the Board. SMART has not filed exceptions to ALJ Amchan's denial of its objections. ALJ Amchan's decision to deny this objection should therefore remain undisturbed. Nevertheless, even if this exception is properly before the Board, ALJ Amchan correctly found that the Union did not raise an issue with Jones' removal of literature until it filed its second amended charge in case 12-CA-222661 on August 3, 2018 – 42 days after the election was held – even though it had notice of the incident immediately after it occurred. [ALJD 5:19-20]. Thus, this issue was not timely raised as an objection to the election. Lastly, even if this objection is not dismissed as untimely, ALJ Amchan correctly concluded that there was no basis for setting aside the results of the election because, based on the evidence presented at the hearing, it is impossible to conclude that Jody James' actions affected the outcome of the election. [ALJD 10:40-11:11].

[3] In its cross-exceptions filed simultaneously herewith, UTLX is contesting ALJ Amchan's conclusion that Respondent, by Jody James, violated Section 8(a)(1) by confiscating the union's flyers in the breakroom. [ALJD 8:25-26]. General Counsel is only contending that Jody James' purported conduct warrants setting aside the election. She is not contending that any other conduct by UTLX occurred during the critical period was properly and timely filed by SMART or otherwise influenced the election.

II. FACTUAL BACKGROUND

A. UTLX Operations

UTLX is a railroad tank car repair and manufacturing company that has a number of facilities throughout the United States. [ALJD 2:28-30; Tr. 131]. It operates a facility in Valdosta, Georgia, that is the subject of this dispute. [ALJD 2:28-30; GC Exh. 1(dd)]. Employees at the Valdosta facility clean, repair, coat, and paint railroad tank cars. [Tr. 131].

B. Procedural Background

Back in February, 2017, SMART won a Board-conducted election at the facility and was certified as the exclusive bargaining representative of the production and maintenance employees on March 6, 2017. [ALJD 3:6-8; JX-2; Tr. 30-31]. Then, in March 2018, UTLX employees signed a petition withdrawing recognition of SMART as their collective bargaining representative.[4] [ALJD 3:8-9; JX-2]. On June 5, 2018, SMART filed yet another petition for a representation election. [ALJD 3:9-11; JX-2]. As such, on June 22, 2018, a second Board-conducted election was held at the Valdosta facility in the employee breakroom between 5:30 and 7:30 a.m. and between 3:00 and 4:00 p.m. [ALJD 3:11-14]. SMART lost by a vote of 55 to 54. [*Id.*; Bd. Exh. 1(d)].

On June 25, 2018, after the election was complete, SMART filed a charge of unfair labor practices (12-CA-222661), as well as objections to the election. [ALJD 3:16; Bd. Exh. 1(e) and 1(g)]. In its objections to the election, SMART specifically stated that its objections to the June 22, 2018 election were based on, "outstanding and unresolved ULP's in Consolidated Complaint

[4] There is no allegation that the withdrawal of recognition was unlawful.

(Cases 12-CA-209024, 214382, 216226, 216231, 219374) and a new ULP filed on Jody James regarding his conduct on or about the week of June 18, 2018." [ALJD 3:45-4:2; Bd. Exh. 1(e)].[5]

The charge that SMART filed on June 25, 2018, (12-CA-222661) alleged that one of UTLX's supervisors, Jody James, threatened to retaliate against employees if they joined or supported a union. [ALJD 5:10-16; GC Exh. 1(g)]. It also alleged that he engaged in surveillance or created the impression of surveillance of employees' union activities. [*Id*.]. That Charge was then amended on July 23, 2018, to include the additional allegation that James interrogated employees about their union activities. [GC Exh. 1(i)]. Charge 12-CA-222661 was then finally amended a second time on August 3, 2018. [ALJD 5:17-18]. At that time, SMART withdrew the previous three allegations from the first amended charge and, for the first time ever, alleged that James confiscated union literature from employees at UTLX back on June 21, 2018. [ALJD 5:18-19; GC Exh. 1(k)].

C. Rule 32 from UTLX's Shop Rules and Penalties

On March 17, 2010, UTLX put in place a handbook that contained various rules, policies, and procedures applicable to its hourly employees, including UTLX's Shop Rules and Penalties. [JX-1; Tr. 8:9-11]. Rule 32 from the UTLX's Shop Rules and Penalties provided that "Statements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees," will result in discharge. [ALJD 3:26-30;

[5] In its objections, SMART did not mention Case 12-CA-210779, which was filed on November 30, 2017, alleging that UTLX's maintenance of two specific handbook rules was illegal. [ALJD 4:2-6]. On September 5, 2018, the Regional Director issued his Report on Objections, Order Directing Hearing and Consolidating Cases, and Notice of Hearing, noting that, "[a]lthough Case 12-CA-210779 was not mentioned in the Petitioner's Objection, it appears that [SMART] likely intended its Objection to encompass all outstanding unfair labor practice charges, even those not included in a complaint at that time." (*Id*.; Bd. Exh. 1(g)). Before the ALJ, UTLX argued that SMART's objection regarding the rules was untimely and should not serve as a basis for setting aside the election. Whether SMART's objection regarding the rules was timely raised was not decided by ALJ Amchan. Ultimately, ALJ Amchan concluded that it was virtually impossible to conclude that the maintenance of the Use of Telephone rule could have affected the election results. [ALJD 8:5-15]. Because General Counsel has not filed an exception with respect to that ruling, it is not before the Board and is now the law of the case. Again, General Counsel's sole argument for setting aside the election is James' removal of the Union flyers in the break room.

JX-1]. In December 2017, on advice of UTLX's general counsel, UTLX rescinded Rule 32 and stopped enforcing it. [ALJD 3:36-41; Tr. 135, 146-147].

According to UTLX management, Rule 32 was intended to prohibit defamatory, maliciously false statements about the Company and employees that were intended to injure UTLX's or management's reputation with customers or its employees. [ALJD 7:24-26; Tr. 134-135, 145]. It was intended to prohibit employees from making statements for no other purpose other than to sabotage the reputation of a member of management or other personnel with the Company, customers, or other individuals related to the business, like employees. [Tr. 134-135]. Moreover, the business reason for this rule was to protect management's relationship with its employees as well as customers that visit the shop in order to maintain revenue streams. [Tr. 145]. The rule was not intended to prohibit employees from complaining about working conditions or restrict complaints about management. [Tr. 134, 145]. UTLX management has never interpreted Rule 32 as limiting an employee's ability to criticize working conditions at the facility, pay and benefits, or management. [Tr. 134-135]. Throughout SMART's organizing campaigns, UTLX management was aware of numerous employees that were critical of the Company and complained about working conditions, including complaints about pay and benefits; yet, not a single one was disciplined under Rule 32. [Tr. 135-136]. As ALJ Amchan correctly stated, the application of Rule 32 is not an issue in this case. [ALJD 7:3].[6]

During the hearing before ALJ Amchan, two hourly employees, TJ Daugherty and Derrell Stone, testified that many hourly employees, including themselves, have been openly critical of management since January 2017, when the first petition for representation election was being circulated amongst employees. [Tr. 26, 77]. Daugherty himself campaigned on behalf of SMART

[6] This is strictly a maintenance case.

during two separate elections, handed out flyers on behalf of SMART that were openly critical of UTLX management, and was a member of SMART's collective bargaining team from the time SMART was confirmed as the representative until the employees withdrew recognition. [Tr. 26]. Both Daugherty and Stone also admitted that they were never concerned about receiving discipline for criticizing UTLX. [Tr. 27, 77]. Not only could they not remember the language from Rule 32, they did not know what Rule 32 was at all; and they never once considered it when they were being openly critical of the Company or campaigning on behalf of SMART. [Tr. 27, 78]. Neither individual could think of a single employee that had been disciplined for being critical of the Company. [Tr. 79]. In fact, Daugherty received a promotion after he campaigned on behalf of SMART during two separate elections and sat on the bargaining committee on behalf of SMART. [ALJD 4:n.2; Tr. 26, 28].

Another hourly employee, Clint Selph, also testified at the hearing that he has complained about working conditions at UTLX in the past and observed other employees making similar complaints, but he is not aware of any Company rule that prohibited him or other employees from doing so. [Tr. 220-221]. Further, he said he never knew of anyone that was disciplined for complaining about working conditions and never feared he would be so disciplined. [Tr. 221].

D. Removal of SMART Literature By Jody James

Jody James is a Repair Supervisor on first shift at UTLX. [ALJD 5:n.5; Tr. 176]. Every Thursday, James conducts a mandatory safety meeting for the employees under his supervision on first shift that usually last approximately 15 minutes, from 8:45 a.m. to 9:00 a.m. [ALJD 4:18-26; Tr. 176-177]. James' Thursday safety meetings are held in the upstairs break room after the employees' break. [*Id.*]. When it is used for trainings, it ceases to be used as a breakroom. [Tr. 177].

On June 21, 2018, several hourly employees gathered in the breakroom during first shift break. [ALJD 4:21-22]. During that break, TJ Daugherty passed out flyers with campaign-related information from SMART in the breakroom upstairs between 8:30 a.m. and 8:45 a.m. [ALJD 4:18-21; GC Exh. 2; Tr. 15-16]. These same SMART flyers were also widely available to employees in other places around the shop. [ALJD 5:1-5; Tr. 188, 212, 219, 226-227, 232, 238]. For instance, there were flyers in the bathroom/locker room that all employees had the opportunity to review. [ALJD 5:1-5; Tr. 201, 212, 219, 227, 238].

Shortly after the break started, James went to the break room to prepare for the safety meeting that would immediately follow the break. [ALJD 4:24-26; Tr. 17, 178]. Prior to the beginning of the meeting, James walked around the tables in the break room and picked up all the flyers on the tables. [ALJD 4:24-26]. [7] Although there is some disagreement amongst the employees that testified at the hearing, the majority stated that there were only three (3) flyers on the break room tables when James picked them up.[8] James waited until all the employees finished reading the flyers before he picked them up. [Tr. 199, 218-219]. Everyone in the break room had the opportunity to review the information in the flyers before James picked them up. [Tr. 187-188, 212]. James did not prevent anyone from reading them. [Tr. 199, 200, 211-212, 218, 232, 238]. Shortly after he collected the three flyers, James started the safety meeting.[9] [Tr. 186, 193].

[7] At that time, TJ Daugherty immediately notified Tommy Fischer from SMART that James had picked up the flyers.

[8] During the hearing, there was some disagreement amongst those present at the safety meeting on June 21, 2018, regarding how many SMART flyers were in the break room when James gathered them. TJ Daugherty and Zachary Timpson said there were over 20 flyers [Tr. 21, 226]; Joe Queen said there were at least 10 flyers [Tr. 47]; Dalton Corbett said there were 5 or 6 flyers [Tr. 112]; and Jody James, Chad Morgan, Tim McEady, and George Padgett said there were 2 or 3 flyers [Tr. 185-186, 198-199, 209-210, 231].

[9] TJ Daugherty, Derrell Stone, Dalton Corbett, and Joe Queen also testified that James said SMART had violated federal law by distributing the flyers in the break room. [Tr. 21, 53, 73, 113]. This allegation was expressly denied by James. [Tr. 186]. Nevertheless, this specific allegation is not cited in any charge of unfair labor practice in violation of 8(a)(1) of the Act; nor was it raised in the Third Consolidated Complaint or SMART's objections to the election.

At the hearing before ALJ Amchan, James stated that his reasons for collecting the SMART flyers were that the safety meeting was beginning and he was told by UTLX management that there could not be any kind of campaign material (either UTLX or SMART) in the polling area within 24 hours of the election.[10] [Tr. 186-187]. As ALJ Amchan found, UTLX did not otherwise interfere with SMART's campaign. [ALJD 5:1-5]. Employees wore pro-union t-shirts and it was TJ Daugherty – not UTLX management – that removed the SMART flyers from the employee locker room/bathroom. [*Id.*; Tr. 31-32, 201, 212, 227].

E. Alleged Comment to Graham Wallace By Graham Bridges

Tank car maintenance work at UTLX occasionally requires repairmen to perform what is known as "hot work." [Tr. 100]. "Hot work" includes welding, cutting, or grinding. [*Id.*]. Whenever an employee performs hot work on a tank car, he or she is required to sign a hot work permit. [*Id.*]. In early 2018, an employee at UTLX by the name of Ridge Wallace received a 30-day suspension for violating UTLX's hot work permit policy when he failed to sign the permit. [ALJD 5:23-25; *Id.*]. Wallace admitted at the hearing that he was aware of the hot work policy he violated prior to his suspension. [Tr. 104-105]. Although he received the 30-day suspension, UTLX allowed Wallace to serve that suspension over a period of 10 weeks. [ALJD 5:24-27; Tr. 101]. During that time period, UTLX permitted Wallace to work Mondays and Fridays. [*Id.*]. At the hearing, Wallace testified that during his suspension in early March 2018, he had a conversation with Graham Bridges about his ongoing suspension. [Tr. 101]. According to Wallace, during their conversation Bridges said, "if it wasn't for the Union [Wallace] would have

Further, there was no testimony by any Company witness that this statement was made. Nevertheless, ALJ Amchan found that he had made this statement. [ALJD 4:n.4].

[10] In fact, he also removed UTLX's campaign materials. There is no evidence or allegation that James allowed anti-union flyers or literature to remain in the break room.

only received a written training on the hot work permit instead of a full 30-day suspension." [ALJD 24-29; Tr. 102-103].[11]

III. ARGUMENT

A. The ALJ Did Not Err in Concluding that UTLX's Maintenance of Rule 32 Does Not Violate Section 8(a)(1) of the Act. (Exceptions 1, 2, 12, and 14).

ALJ Amchan did not err in concluding that UTLX's maintenance of Rule 32 of the Shop Rules did not violate Section 8(a)(1) of the Act. [ALJD 7:5-26]. Again, that rule provided that, "Statements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees," will result in discharge. [ALJD 7:8-9; JX-1].

On its face, Rule 32 did not explicitly restrict activity protected by Section 7. Moreover, UTLX did not adopt this rule in response to protected activity and it has not been applied to restrict such activity. [JX-1; Tr. 8:9-11]. Indeed, there is no evidence that UTLX disciplined any employees under Rule 32 rule even though numerous employees were highly critical of UTLX and its management during the election. [Tr. 136]. The application of Rule 32 was not an issue in this case. [ALJD 7:3]. Provided these circumstances, ALJ Amchan correctly concluded that this case is governed by the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017). [ALJD 6:33-34].

In *Boeing*, the Board delineated three (3) categories of "rules." 365 NLRB No. 154, at *4. Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the employer's justification for the

[11] Although Wallace testified at the hearing that Bridges told him he would have received "written training," ALJ Amchan somehow concluded that Wallace had said "written warning" without explanation. Regardless, in its cross-exceptions filed simultaneously herewith, UTLX is contesting ALJ Amchan's factual finding that Bridges told Wallace that if it were not for the Union, Wallace would have received a written warning instead of a 30-day suspension. [ALJD 5:26-28].

rule outweighs the potential adverse impact on protected rights. *Id*. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with Section 7 rights and whether legitimate justifications outweigh any adverse impact on employee rights. *Id*. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. *Id*. A rule which is not unlawful to maintain, may be unlawful as applied but that is not an issue in this case. *Id*. at *5.

Under the *Boeing* standard, ALJ Amchan properly found that Rule 32 would not be reasonably read as encompassing Section 7 activity. [ALJD 7:5-10]. Despite General Counsel's contention, a reasonable employee would certainly not read Rule 32 as threatening discharge if he or she made comments critical of UTLX or its treatment of employees. [GC Brief at 15]. A reasonable employee reads rules aware of their legal rights. *T-Mobile USA, Inc. v. NLRB,* 865 F.3d 265, 271 (5th Cir. 2017). Had UTLX's employees even been aware of Rule 32, and there is no evidence that they were [Tr. 27, 78], they would have read this rule well aware of their Section 7 rights. During a union campaign, union supporters rarely run a campaign predicated upon saying nice things about management or the employer. Employees could, and often did in this case, make comments critical of UTLX during the Union campaign. [Tr. 26, 77]. Yet no one was disciplined as UTLX and the employees that testified at the hearing recognized that there was no rule that covered their protected activities. [Tr. 27, 77]. That is because Rule 32 did not prohibit employees from making statements intended to achieve changes in working conditions or increased wages – it prohibited employees from making statements solely intended to damage the Company's reputation with customers or other employees. [Tr. 134-135, 145]. A reasonable employee, aware of his legal rights, would know the difference. While General Counsel accepts the test is an "objection" one, it is also one that is based on a totality of the circumstances. *The Roomstore*, 357

NLRB 1690, 1690 n.3 (2011). A hypothetical employee at UTLX would be aware of his rights and the aforementioned facts, and therefore would not read the rule as intruding on Section 7 rights.

Despite General Counsel's contention, Rule 32 is similar to the rules that the Board found did not violate the Act in *Albertson's*, 351 NLRB 254 (2007) and *Lafayette Park Hotel*, 326 NLRB 824 (1998). The ALJ did not err in relying upon these cases. In *Albertson's*, 351 NLRB 254, 258-59, the Board held that a rule prohibiting off-the-job conduct which has a negative effect on the company's reputation…" did not violate the Act.[12] In *Lafayette Park Hotel*, 326 NLRB 824, 826-27, the Board held that a rule prohibiting improper conduct off the hotel's premises or during non-working hours which affects the hotel's reputation or good will in the community did not violate the Act. Like Rule 32, the lawful rules at issue in both of those cases involved employee conduct that negatively impacted the companies' reputations. Thus, UTLX's Rule 32 is a category 1 rule under *Boeing* and does not violate Section 8(a)(1) of the Act.

All that said, as ALJ Amchan noted, UTLX's Rule 32 went one step further than the non-violative rules in *Albertson's* and *Lafayette Park Hotel*, requiring employees to have an "intent to injure" the Company's reputation. [ALJD 7:16-18]. This is significant. General Counsel argues that another rule (i.e., standard of conduct 18) that the Board found unlawful in *Lafayette Park Hotel* is more applicable to this case. In that case, standard of conduct 18 prohibited employees from, "[m]aking false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees." But, despite General Counsel's suggestion to the contrary,[13] the reason the Board found that rule unlawful in *Lafayette Park* was because it "punished merely

[12] In *Albertson's*, the Board specifically cited to *Lafayette Park Hotel*, 326 NLRB 824, 826-827 (1998), stating that the company's "off-the-job conduct rule is similar to the off-duty misconduct rules in *Lafayette Park Hotel*."

[13] General Counsel suggest in her Brief that the inclusion of the word "malicious" did not save standard of conduct 18; however, the Board only took issue with the rule's prohibition on statements that were "merely 'false.'" *Id.*

'false' statements, as opposed to maliciously false statements." *Id*. at 828, citing *Cincinnati Suburban Press,* 289 NLRB 966, 975 (1988). Otherwise, "[t]he Board, with Court approval, has consistently held that an employer may lawfully maintain a rule that prohibits 'malicious' statements." *S. Maryland Hosp.*, 293 NLRB 1209, 1222 (1989). Moreover, the Board has previously defined the term "malicious" as the "***intention or desire to harm another usually seriously***, through doing something unlawful or otherwise unjustified; willfulness in the commission of a wrong; evil intention." *Id.* citing *Webster's Third New International Dictionary* (1981). Provided this definition, it only makes sense that UTLX management testified that Rule 32 was intended to prevent malicious statements against the Company and employees that could injure UTLX's reputation with customers and employees. [Tr. 144-145]. As such, ALJ Amchan correctly found that Rule 32 was "aimed at maliciously false statements," and does not violate the Act. [ALJD 7:26-24].[14]

Even if Rule 32 posed a potential adverse impact on Section 7 rights, which it does not, UTLX's justification for Rule 32 outweighs that potential impact. Under *Boeing*, when evaluating a facially neutral rule that, when reasonably interpreted, would potentially interfere with NLRA rights, the Board evaluates two things: (1) the nature and extent of the potential impact of the rule on Section 7 rights, and (2) the legitimate justifications associated with the rule. 365 NLRB No. 154, at *4. The Board focuses on a reasonable interpretation of the rule from the perspective of employees, and attempts to balance between the invasion of employee rights protected by the Act and the asserted business justifications for the rules. *Id*.

Applying this balancing test to the current case, it is clear that Rule 32 did not violate Section 8(a)(1). Any potential adverse impact on Section 7 rights by Rule 32 would have been

[14] In any event, *Boeing* has changed the legal landscape. The instant rule is also similar to a type of civility rule which *Boeing* concluded is presumptively valid. 365 NLRB No. 154, *16.

slight. TJ Daugherty, who campaigned on behalf of SMART during both campaigns, admitted that he was unaware of Rule 32 and did not consider it while he was campaigning against the Company, including when he was making derogatory statements about the Company. [Tr. 26-27]. Any objectively reasonable employee would be aware of these facts and his rights under the Act. In contrast, UTLX is in a highly competitive industry – it has an interest in not having its reputation maligned to customers by employees. [Tr. 145]. Further, UTLX has an interest in preserving the working relationship between employees and management. [*Id.*]. According to UTLX management, Rule 32 was intended to prevent malicious statements against the Company and employees that could injure UTLX's reputation with customers and employees. [Tr. 144-145]. The business justification for the rule was to protect the Company's relationship with its employees and also with customer representatives that visit the shop. [Tr. 145]. Employees intentionally and maliciously spreading false information for the purpose of defaming the Company could affect the Company's relationship with employees and customers and, consequently, UTLX's revenue stream. Considering that any potential adverse impact on Section 7 rights posed by Rule 32 was minimal, that potential impact was heavily outweighed by the Company's goal of maintaining civility with its employees and protecting its reputation with customers from malicious statements in order to protect its bottom line. Moreover, Section 8(a)(1) violations are based upon a totality of the circumstances. *The Roomstore*, 357 NLRB 1690, 1690 n.3 (2011). A reasonable employee would be aware that other employees have routinely criticized the Company or management without repercussions. Thus, Rule 32 did not violate Section 8(a)(1) of the Act when it was still in place and, as such, the ALJ did not err in failing to include a remedy for UTLX's maintenance of Rule 32.

Lastly, the fact that UTLX subsequently rescinded Rule 32 does not lessen the importance of the stated justification for the rule while it was still in effect. During the hearing, Director of Shop Operations, John Bauer, testified that he rescinded the rule at the instruction of general counsel for UTLX. [Tr. 146:13-23]. This rescission was effective across all of UTLX's facilities in multiple states and there is no evidence in the record as to why the rule was rescinded. [Tr. 150-151]. What is more, there is no evidence that this rule was rescinded because UTLX believed it to be in violation of its employees' Section 7 rights. Indeed, UTLX rescinded Rule 32 at the same time it was making wholesale revisions to its policy handbooks across its multiple locations. [*Id*.]. Without any evidence as to why Rule 32 was specifically rescinded, it would be wholly inappropriate for the Board to infer a lack of a legitimate justification for Rule 32 based upon its rescission.

For these reasons, the Board should deny General Counsel's exceptions 1, 2, 12, and 14.

B. The ALJ Did Not Err in Overruling SMART's Objection to the Election Based Upon Jody James' Removal of SMART Literature From the Break Room. (Exceptions 3 Through 8).

As a threshold matter, whether ALJ Amchan erred in overruling any of SMART's objections to the election is not properly before the Board. In its Brief, General Counsel goes to great lengths to explain why she did not seek a new election on the basis of the objections filed by SMART. According to General Counsel, it is not her role to advocate on behalf of the Union in the representation portion of the hearing. UTLX agrees. The parties to the election are responsible for making their case as it relates to the representation question. Accordingly, during the hearing on November 14, 2018, General Counsel specifically denied that the Region was seeking to have the election re-run. [Tr. 12]. Indeed, General Counsel stated at the hearing that it was the Union's job to seek a new election. [*Id*.]. In its post-hearing brief, General Counsel also failed to advocate for a new election. General Counsel should not be permitted to now seek to have the election

results set aside. To the extent SMART wanted to file its own exceptions to the ALJ's decision, it had the opportunity to do so. However, SMART has not filed any exceptions and has implicitly accepted the ALJ's rulings with respect to the election. Thus, this issue is not properly before the Board and should be dismissed.

Regardless, even if the Board does not dismiss these exceptions, they should be denied for the following reasons.

Exception 8

General Counsel contends that the ALJ erred by inferring a lack of merit to SMART's objections from General Counsel's lack of support for the objections in its post-trial brief. This exception is meritless. The ALJ did not base any part of his decision to deny SMART's objections on the fact that General Counsel was not seeking a new election at the hearing or in its post-hearing brief.[15] The ALJ simply mentioned General Counsel's lack of support for a new election to show that General Counsel may have believed there was a non-frivolous procedural issue with SMART's objection based upon Jody James' alleged confiscation of union literature. [ALJD 9:n.10]. Even so, ALJ Amchan did not decide the issue of whether this objection was properly before him. [ALJD 9:9]. Thus, this exception should be denied.

Exception 7

General Counsel also contends that ALJ Amchan erred by inferring a lack of merit in SMART's objections to the election by his statement that UTLX had raised "a non-frivolous issue" that SMART's objection regarding James' alleged confiscation was untimely. This exception is also meritless. ALJ Amchan specifically stated that he did not decide the procedural issue of whether the objection to James' conduct was properly before him. [ALJD 9:9-10]. He merely

[15] Contrary to General Counsel's assertion, the ALJ never mentioned the contents of General Counsel's post hearing brief in his Decision dated January 11, 2019.

stated that this was not a frivolous argument for UTLX to make. [*Id.*]. This exception should be denied.

Exceptions 3, 5, and 6

Although he noted that it was a "non-frivolous" issue, ALJ Amchan did not determine there was a procedural defect in SMART's objection to the election on the basis of James' removal of Union literature from the break room. But ALJ Amchan did find it significant that SMART knew about James' confiscation of literature immediately after it happened and did not raise the issue until it filed its second amended charge in case 12-CA-222661 on August 3, 2018. [ALJD 5:18-19]. Accordingly, ALJ Amchan appropriately inferred that SMART did not find James' removal of Union literature from the break room to be significant enough to have any impact on the election. [ALJD 9:5-8; Tr. 35].

Nevertheless, had ALJ Amchan decided the procedural issue regarding whether the objection was timely filed, he would have dismissed this objection as untimely. SMART could not set aside the election results due to Jody James' removal of the flyers from the breakroom because that allegation was not timely raised as an objection to the election. Although she states she has no position on the matter, General Counsel now argues to the Board that SMART's timely-filed objection regarding James' conduct during the week of the election was "obviously intended to encompass his confiscation of literature on June 21." However, this was not obvious at all. Contrary to General Counsel's exception, the ALJ did not err in finding that SMART's timely filed objections did not mention the allegation that Jody James confiscated Union literature. [ALJD 9:6-8].

On June 25, 2018, SMART served its election objections and specifically stated that one of its objections was based on "a new ULP filed on Jody James regarding his conduct on or about

the week of June 18, 2018." [ALJD 3:43-4:2; Bd. Exh. 1(e)]. In that Charge (12-CA-222661), also filed on June 25, 2018, SMART alleged that on June 21, 2018, Jody James threatened to retaliate against employees if they joined or supported a union, and also alleged that he engaged in surveillance or created the impression of surveillance of employees' union activities. [GC Exh. 1(e)]. However, there was no factual basis asserted as to what James did or how those actions impacted (even theoretically) the election. Therefore, the objection and the Charge it referenced did not comport with NLRB Regulation 102.69(a). *See Factor Sales*, 347 NLRB 747, 748 (2006) (overruling objection that did not provide clear notice of basis of objection); *Garren, How to Take a Case Before the NLRB*, (BNA, 9th Ed. 2016) at Chapter 10.I.B, page 10-5 ("Parties must submit a short but specific statement of the underlying reasons for the objections filed. Objections that fail to include such a statement will be rejected.") (citations omitted).

Not only were SMART's factual assertions insufficient to serve as the basis for an objection, but SMART never timely filed an objection on the basis of Jody James' removal of the flyers from the break room on June 21, 2018. Under NLRB Regulation Section 102.69(a), "objections" must be filed and served within 7 days of the tally of ballots being prepared. In this case, the ballots were tallied on June 22, 2018. Thus in order to be timely, SMART was required to file its objections by June 29, 2018. Here, SMART did not file the second amended charge in Case 12-CA-222661 concerning the alleged confiscation until 42 days after the ballots were tallied and the objection concerning the alleged confiscation was not raised until some 75 days after the ballots were tallied.

Further, the Regional Director had no authority to extend the time for filing an objection with respect to James' alleged misconduct. NLRB Case Handling Manual, Section 11392.2(a)(2): Prejudice (or lack thereof) is not a factor. Objections are timely filed or they are not. *North Star*

Steel Co., 289 NLRB 1188, 1188-1189 (1988). Here the allegation concerning confiscation was untimely. *Star Video*, 290 NLRB 1010 (1988) (proper for Regional Director to "mechanically apply" timeliness rule as rule is to be "strictly applied").

General Counsel cannot contend that SMART's objection was timely because Jody James' conduct was discovered during the course of the Regional Director's investigation into the Charge and/or the objections SMART filed on June 25, 2018. It is true that an election may be set aside on the basis of objectionable conduct discovered by the Regional Director in the course of his investigation of a party's timely filed election objections. *John W. Galbreath & Co.*, 288 NLRB 876, 878 (1988). However, established Board law also states that:

> [I]f the evidence of misconduct unrelated to the timely filed objections comes to the Regional Director's attention during the investigation at the initiative of the objecting party after the time for filing objections has expired, the new evidence should not be considered as a basis for setting aside the election unless the objecting party has provided clear and convincing proof that the evidence was "not only newly discovered, but also previously unavailable."

Id. citing *Burns International Security Services, Inc.*, 256 NLRB 959, 960 (1981). This is exactly what occurred in this case.

Again, on June 25, 2018, SMART filed its original Charge 12-CA-222661 regarding Jody James' conduct, alleging that he threatened to retaliate against employees if they joined or supported a union, and also alleging that he engaged in surveillance or created the impression of surveillance of employees' union activities. [GC Exh. 1(e)]. In that original Charge, SMART said nothing about confiscation. The time for SMART to file objections then expired on June 29, 2018. Thereafter, on July 23, 2018, SMART amended Charge 12-CA-222661 to add the additional allegation that Jody James was interrogating employees about their union activities. [Bd. Exh. 1(i)]. Again, SMART said nothing about confiscation. Finally, when SMART amended Charge 12-CA-222661 a second time on August 3, 2018, SMART completely withdrew those previous

three allegations and substituted the allegation that Jody James confiscated union literature from employees in the break room. [ALJD 5:17-18; GC Exh. 1(k)]. However, the allegation that James removed SMART's flyers was not based upon "new evidence" that was "newly discovered" and "previously unavailable." TJ Daugherty testified at the hearing that he informed SMART's International Representative, Tommy Fischer, of this incident immediately after James picked up the flyers. [ALJD 9:6-8; Tr. 35]. Obviously, SMART was well aware that Jody James removed the SMART flyers from the break room on June 21, 2018, yet they did not include it in a Charge until 42 days after the ballots were tallied.

In a peculiar attempt to cure SMART's untimely objection, General Counsel asks the Board to take administrative notice that the Charge referenced in the objections (12-CA-222661) and simultaneously filed on June 25, 2018, was e-filed by SMART, and that the Board's website does not give a charge filer the option of alleging the unlawful confiscation of literature. However, there are several problems with General Counsel's suggestion. First, there is no evidence that SMART electronically filed its Charge (12-CA-222661) or its first amended Charge using the "e-filing charge wizard." Even if it did e-file those Charges, beneath the options listed for alleging unlawful conduct, the website specifically states that "**If you want to file a charge concerning situations not covered by this list, please use the forms provided on our website and/or contact the Information Officer at one of our field offices.** You can find the field office nearest you by clicking here or by calling 1-866-667-NLRB." (emphasis added). Had SMART intended on raising the issue of James' confiscation, it would have completed and submitted another form. However, it did not do so. Lastly, if SMART's allegations in its original Charge and its first amended Charge were intended to broadly allude to James' removal of union literature from the break room, there would have been no reason for SMART to file a second amended Charge

including that allegation – but it did. The only reasonable conclusion to draw from the filing of the second amended Charge is that the allegation it contained (regarding James' confiscation) was not previously included in the first two iterations.

Thus, even if ALJ Amchan had decided the procedural issue with respect to SMART's objection based upon James' alleged confiscation of Union literature, he would have dismissed the objection as untimely. And that determination would have been correct. SMART's objection based upon James' alleged confiscation was untimely. The Board should not set aside the June 22, 2018 election results. *Campbell Prod. Dep't*, 260 NLRB 1247 (1982) (Regional Director properly certified results where objections, including untimely objection, unproven and insufficient to overturn result.)

Exception 4

Finally, even if SMART timely raised its objection to the election based upon James' alleged confiscation of Union literature, the ALJ did not err in concluding that said confiscation could not possibly have affected the outcome of the election.

Representation elections are not lightly set aside. *Quest Int'l*, 338 NLRB 856, 857 (2003). Indeed, the burden on the party seeking to set aside the result is a "heavy one." *FJC Security Servs., Inc.*, 360 NLRB 32, 36 (2013). In particular, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Mfg.*, 941 F.2d 325, 328 (5th Cir. 1991). The objecting party must show that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the election. *Delta Brands, Inc.*, 344 NLRB 252, 253 (2006). Here, as the objecting party, SMART had the burden of proving interference with the election. *FJC Security Servs., Inc*, 360 NLRB 32, 36 (2013). The test, applied objectively, is whether the objected-to conduct has the tendency to

interfere with the employees' freedom of choice. *Id*. As ALJ Amchan correctly concluded, SMART did not meet its burden.

Nothing James allegedly did would warrant setting aside the election.[16] In assessing whether conduct interfered with an election, the Board considers "the number of incidents, their severity, the extent of dissemination, the size of the unit and other relevant factors." *Id.* In this case, ALJ Amchan did not err when he concluded that the collection of SMART literature could not possibly have affected the results of the election. First, the removal of SMART literature from the break room happened on only one occasion.[17] [ALJD 9:13-14]. Second, Jody James removed only three SMART flyers from the room. [Tr. 185-186, 198-199, 209-210, 231]. Third, there is no evidence that information about this incident was widely disseminated amongst the hourly employees. Fourth, removing the flyers from the breakroom did not inhibit the employees' ability to share and receive information about Union issues or hinder communications between the voters themselves during the critical period. SMART was allowed to distribute flyers throughout the plant during the final 24 hours. [ALJD 5:1-5]. In fact, there were several SMART flyers available to employees in the bathroom/locker room and management did not interfere with the wearing of pro-union employee t-shirts or otherwise interfere with the Union's campaigning. [*Id*.].[18] Lastly, one would assume that if SMART believed James' act impacted the election, SMART would have

[16] General Counsel also argues that Jody James' alleged statement that having the flyers in the break room was a "federal violation" was also objectionable conduct that provides a basis for setting aside the election. That allegation was never presented by the Regional Director in the Third Consolidated Complaint; nor was it alleged by SMART in its objections to the election. Not only did James not make the statement but, even if he had, "the mere fact that a party makes an untrue statement, whether of law or fact, is not grounds for setting aside an election." *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988). If SMART wanted to litigate this allegation, it should have been stated in a charge of unfair labor practices and in its objections. *Champion Int'l Corp.*, 339 NLRB 672, 673 (2000).

[17] In *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016), the employer removed union literature from the break room on at least three separate occasions, beginning within a week of the union filing a representation petition. [ALJD 9:12-20].

[18] Further, there is no evidence of discrimination. James did not allow anti-union material to remain untouched or substitute pro-company flyers. Rather, he took down UTLX's campaign materials.

immediately (and timely) mentioned it in its objections to the election in the first place. However, as discussed above, SMART did not raise this issue until 42 days after the ballots had been counted. [ALJD 9:6-7].

SMART also cannot argue that James' removal of the flyers from the break room denied the hourly employees access to the information. James did not gather up the propaganda until the break was ending and work time was starting. [Tr. 186, 193]. Moreover, he made no effort to prevent a single employee from reading the materials during the break and all of the employees present in the break room that morning had the opportunity to review the flyers. [Tr. 199, 200, 211-212, 218-219, 232, 238]. Although ALJ Amchan noted that it was "likely" that James' confiscation of the Union flyers prevented other eligible voters from UTLX's second and third shifts from seeing the flyers on the day before the election [ALJD 9:n.9], he did not find that fact to be true because there was absolutely no evidence on the record that any second or third shift employees entered the break room on June 21, 2018.

Finally, there is simply nothing about the removal of the flyers from the breakroom that would impact how an employee would vote in a secret ballot election. It is neither a threat nor a promise. It was simply (at worst) overzealous housekeeping applied with equal vigor to the employer's campaign materials during the last 24 hours prior to the election. Moreover, all of the employees in the break room on June 21, 2018 that testified at the hearing said that they either did not witness James pick up and remove the SMART flyers or, if they did witness him pick up the flyers, that action did not influence how they voted in the election. [Tr. 35, 83, 201, 213, 219, 227, 235, 237]. Again, flyers were widely available in other locations within the facility.

For these reasons, even if SMART timely raised an objection based upon James' removal of SMART flyers from the breakroom, SMART did not show that James' conduct affected

employees in the voting unit and had a reasonable tendency to affect the election. In sum, taking three pieces of paper from the breakroom (as the break was ending) was, as ALJ Amchan correctly found, simply too de minimus to justify setting aside the election results from the June 22, 2018, election.

For these reasons, the Board should deny General Counsel's exceptions 3, 5, and 6.

C. The ALJ Did Not Err in Concluding That Graham Bridges Alleged Statement To Ridge Wallace Did Not Violate Section 8(a)(1) of the Act. (Exceptions 9 through 11, 13, and 15).

In his Decision, ALJ Amchan found that on some unknown date in March 2018, Supervisor Graham Bridges told employee Ridge Wallace that if it were not for the Union being in place at the time of his discipline, Wallace would have received a written warning instead of a 30-day suspension.[19] Citing to *International Backing Co. & Earthgrains*, 348 NLRB 1133, 1135 (2006), ALJ Amchan correctly concluded that Bridges' alleged statement was not a violation of Section 8(a)(1) because it was a statement about how the Company dealt with his discipline in the past because of unionization. [ALJD 10:15-20].

In her brief, General Counsel misstates the portion of *International Backing Co. & Earthgrains* that ALJ Amchan referenced in his Decision. [GC Brief at p. 28]. That case, as cited in the Decision, is applicable here. In *International Backing Co. & Earthgrains*, 348 NLRB 1133, 1135 (2006), the company held three meetings with its employees during which a company representative informed employees that "unfortunately under a union contract if there is a disciplinary procedure in that union contract we would not have the luxury of deviating from it

[19] Despite General Counsel's representation to the Board, ALJ Amchan did not find that Supervisor Bridges made the alleged statement to Wallace on a Monday in early March 2018. [GC Brief at p. 26]. Indeed, the ALJ only reached the conclusion that the conversation occurred "sometime in March 2018." [ALJD 5:26]. As such, he could not determine whether Bridges made the alleged statement before or after UTLX withdrew recognition of SMART on March 9, 2018. [ALJD 10:21-24]. Nevertheless, in its cross-exceptions filed simultaneously herewith, UTLX is contesting ALJ Amchan's factual finding that Bridges told Wallace that if it were not for the Union, Wallace would have received a written warning instead of a 30-day suspension. [ALJD 5:26-28].

because we end up with union grievances as a result of it." The Board held that this statement was not a violation of Section 8(a)(1) because an employer does not violate the Act by informing employees that unionization will bring about "a change in the manner in which employer and employee deal with each other." *Id*. citing *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

In other cases, the Board has found statements like the one in *International Baking Co. & Earthgrains* similarly lawful. For instance, in *Tri-Cast, Inc.*, the employer informed an employee that with a union representing the workforce the employer would have to "go by the book" in its treatment of employees, and that it would have less ability to deal individually with employees. 274 NLRB at 377. (not objectionable for employer to state in letter to employees that "If the union comes . . . We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing"). *See also Beverly Enterprises*, 322 NLRB 334,344 (1996) (lawful to tell employee that "if the Union comes in, she would have to go by the book; she wouldn't be able to treat the nurses individually anymore"), *enf'd*, denied on other grounds, 139 F.3d 135 (2d Cir. 1998).

Here, UTLX's "book" called for a 30-day suspension for any employees that violated the hot-work permit policy. Accordingly, Bridges allegedly told Wallace that because the Union was in place at the time of his discipline, UTLX had no choice but to abide by the Company policy that called for a 30-day suspension. If it did not, there would have been a union grievance. Bridges' statement was not a threat of harsher discipline because the employees voted in the Union; nor was it a suggestion that employees who supported the union would face less leniency or stricter enforcement of rules. Bridges was simply informing Wallace what happened at the time of his discipline due to the changed relationship between employees and management during bargaining with SMART.

Despite General Counsel's view, the timing of this alleged statement is significant. On March 9, 2018, the employees at UTLX signed a petition to withdraw recognition of SMART as their collective bargaining representative. At the time Bridges made the statement to Wallace, SMART may or may not have been representing the employees. According to ALJ Amchan, this statement may have influenced whether or not an employee would sign a decertification petition. [ALJD 10:13-24]. Thus, had the statement been made prior to the decertification, Bridges' statement would have interfered with Wallace's Section 7 rights. However, there was insufficient evidence to prove whether Bridges made this statement before UTLX withdrew recognition from the Union. Consequently, this comment could not be construed as a suggestion that employees who support the Union will face less leniency or stricter enforcement of rules. Thus, the timing of Bridges' comment was different than the statements made in cases cited by the General Counsel, where employers promised stricter enforcement of rules in retaliation for the selection of union representation. See, e.g., *Westwood Health Care Center*, 330 NLRB 935, 957, 961-962 (2000)(at the time of the statement, there was an open representation petition).

For these reasons, the Board should deny General Counsel's exceptions 9, 10, 11, 13, and 15.

IV. CONCLUSION

For the foregoing reasons, UTLX respectfully urges the Board to deny all of the General Counsel's exceptions and affirm ALJ Amchan's Decision dated January 11, 2019.

Dated: February 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, the foregoing Union Tank Car Company's Answering Brief to The General Counsel's Exceptions to the Decision of the Administrative Law Judge was served as follows:

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